NO. 88-656

In The Supreme Court of the United States

OCTOBER TERM, 1988

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

WILBUR H. FRIEDMAN, JR.,
Petitioner

v.

THOMAS B. FERGUSON, ET AL.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the lower courts improperly dismissed this civil rights action on the grounds of res judicata and collateral estoppel action where, inter alia, there was pending in the state courts a case whose disposition on the merits would have a decisive impact on the instant action.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

WILBUR H. FRIEDMAN, JR. [1]
Petitioner

v.

THOMAS B. FERGUSON, ET AL.[2]
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Wilbur H. Friedman, Jr., Plaintiff below, petitions the Court to review the conclusion of the United States Court of Appeals sustaining the District Court's dismissal of this suit on the grounds that his claims are barred by **res judicata** and collateral estoppel.

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1. Below, Wilbur H. Friedman.
2. Thomas B. Ferguson, Director, Department of Animal Control, a State Actor, in his official and individual capacities; Brett Boe; Carla Coe; Donna Doe; Frank Foe; Grace Goe; Harry Hoe, State Actors, Advisors to Defendant Ferguson, in their official and individual capacities (identities currently unknown); Marta Moe; Norma Noe; Paula Poe; Ralph Roe; Sammy Soe; Tommy Toe; Private Individuals who conspired

REFERENCE TO OPINIONS BELOW

The Appendix hereto contains: (A) Court of Appeals' order denying the petition for rehearing; (B) Court of Appeals' opinion affirming the District Court; (C) decision and order of the District Court; (D) unpublished decision in a related zoning case by Maryland's Court of Special Appeals; and (E) Maryland's Court of Appeals' denial of petition for certiorari in the zoning case.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1) and 2101(c). The Court of Appeals' order denying Petitioner's petition for rehearing was

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with the foregoing State Actors (identities currently unknown); Roger W. Galvin, Chairman, Animal Matters Hearing Board; Vince Voe; William Woe; Xerxes Xoe; Members of the Animal Matters Hearing Board, State Actors, in their official and individual capacities (identities currently unknown).

filed on July 21, 1988.

STATEMENT

This is a suit against various officials of Montgomery County, Maryland, for injunctive and declaratory relief, and damages under 42 U.S.C. Sec. 1983. There are pendent claims. At the time Petitioner filed the suit, a related zoning case was pending before the Maryland state courts. In that case, Petitioner was seeking, as he has without success for three years, a forum in which to assert a right arising from an ordinance whose validity no one has ever questioned. Disposition of that case on the merits would have a decisive impact on the instant suit. The District Court dismissed this suit, on the grounds that as to certain elements of the suit, abstention was warranted under **Younger v. Harris**, 401 U.S. 37 (1971); as to

Petitioner's allegations of harassment, insufficient evidence appeared to support the allegations; and as to other elements of the suit, they were precluded by previous state court decisions. The Court of Appeals affirmed the decision of the District Court solely on the grounds that Petitioner's claims were barred by **res judicata** and collateral estoppel.

Dismissal of this suit is improper until the issue raised by the state court case is resolved either in state court or in this very suit. In addition, this suit raises one issue, namely the power of the county administrative agency, which under state law is not subject to preclusion.

1. While one ordinance has been said to bar the fences which Petitioner has erected, another ordinance arguably privileges and requires them.

More particularly, and as set forth in Petitioner's verified complaint herein, Section 59-C-1.31 of the Montgomery County zoning code states that kennels, non-commercial are permitted uses in the zone wherein Petitioner resides, provided that "no accessory buildings, enclosures or runs may be constructed or used for these dogs."

On the other hand, the animal control ordinance, Section 5-67, privileges a home owner in the zone wherein Petitioner resides to maintain a kennel, non-commercial and to be a dog fancier. A "dog fancier" is a person who keeps three or more dogs used for various purposes, including show, "within or **adjoining** a private residence" and a "dog fancier's kennel" is one located "within or **adjoining** a private residence for the maintenance or training of the dogs." Dog

fancier's kennels must be licensed; surplus puppies may be bred occasionally and sold by the fancier if the breeding is for a non-commercial purpose and not the primary function of the kennel; there is a prima facie test of commercial breeding, namely six litters a year; and dog fanciers are exempt from the requirement of licensing dogs individually. Licenses, apparently including dog fanciers' licenses, may not be issued for any establishment the location or other characteristic of which violates the zoning code. There is no specified upper limit on dogs. With respect to dog fanciers, the form utilized by the Department of Animal Control indicates that the current licensing fee for a kennel with 3-10 dogs is $10. per year, while the licensing fee for a kennel of more than 10 dogs is

$20. per year. Three sections of the animal control ordinance require the use of enclosures in certain circumstances. Section 5-30 requires the owner of a female dog while in heat to "confine it in a building, compartment, or other secure **enclosure** in such a manner as to prevent the attraction of other dogs." Section 5-31 requires the owners of a vicious or dangerous animal to keep such animal "confined in a building, compartment, or other secure **enclosure** in such a manner as will prevent direct contact between such animal and human beings or other animals." A third ordinance requires the enclosure of attack dogs.

There is obviously tension between the animal control ordinance and the zoning code. Thus, some dog fanciers have attack dogs, vicious and dangerous

dogs, and many have female dogs which are at times in heat. In addition, it is difficult to see how dogs can be maintained "adjoining a private residence" without fences. Finally, as fences are often necessary to confine puppies, the right to breed puppies would seem to imply a right to use fences to confine them.

2. Petitioner attempts to invoke the ordinance permitting and requiring the fences, but has found no state forum in which to invoke the ordinance.

For several years, Petitioner's wife had been a licensed dog fancier in Montgomery County. She utilized several fences in the back yard to confine puppies and female dogs in heat.[3] On

3. The County Attorney's brief below, p. 5, par. 2, states: "A civil citation was issued to [Petitioner] on May 8, 1985, charging him with maintaining a dog enclosure..." That citation became the subject of a trial in District Court, and

August 8, 1985, Petitioner applied to Montgomery County's Department of Environmental Protection (DEP) for a building permit for the fences for the stated purposes of confining puppies and female dogs in heat. DEP denied the permit, on the grounds that the zoning code prohibits an enclosure for a kennel, noncommercial, in the zone in which Petitioner resides. Thereafter Petitioner filed a petition for a variance with Montgomery County's Board of Appeals, a tribunal which decides zoning issues. At all times Petitioner has argued that the Board of Appeals was required to look outside the zoning code to determine whether the "use" said to be barred by

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an appeal the Circuit Court for Montgomery County in Criminal No. 39216, in which that Court, dismissed the complaint for insufficient evidence of violation. The court did not consider the interplay between the two regulatory schemes.

the zoning code was required or permitted by the animal control ordinance, and to harmonize the two regulatory schemes. The Board of Appeals and Maryland courts, Appendices D and E, have each declined to consider this substantive contention; thus the Court of Special Appeals opined that Petitioner did not enjoy standing to invoke the dog fancier ordinance because, as it erroneously thought, Petitioner, unlike his wife, had not applied for a dog fancier license. The zoning case is back before Maryland's Court of Appeals on a motion for reconsideration.

3. The Department of Animal Control delicenses Petitioner's wife as a dog fancier because of the backyard fences; the Animal Matters Hearing Board determines that the dogs are a public nuisance based, inter alia, on the loss of the fancier's license.

In the meantime, on August 15, 1985, the Montgomery County Department of Animal Control administratively revoked Petitioner's wife's dog fancier license solely because of the existence of the alleged zoning violation, namely the existence of the internal fences in Petitioner's back yard.[4] Thereafter, on January 14, 1986, the Animal Matters Hearing Board (AMHB) rendered a decision, which ran against both Petitioner and his wife, that Bloor's dogs were a public nuisance.[5] The decision contained a finding of fact, namely that during the year 1985, 27 dogs were owned and controlled by Petitioner and his wife on the property in November 1985, and at the time of hearing there were eight adult dogs. The decision ends: "Approved as

4. Defendant's brief to the Court of Appeals, Ex. 2.
5. Defendant's brief to the Court of Appeals, Ex. 3.

to form and legality. Office of the County Attorney. By [Assistant County Attorney] A. Wright. 1-10-86." While there was no statement of reasons for AMHB's decision, 17 months thereafter, Petitioner discovered that AMHB, in making its decision, had relied on the fact that Petitioner's wife had been delicensed as a dog fancier. Thus, on June 24, 1987, Petitioner found in the Department of Animal Control case file a letter, dated June 30, 1986, from Board member Braddy, who participated in the case, to AMHB. [6] The letter commences:

> It was the understanding of the Board [when deciding the nuisance case] that Mrs. Bloor was no longer licensed as a dog fancier.... A preponderance of evidence showed that the animals in the stated case were being maintained for breeding and the sale of offsprings on a commercial scale. It is understood that without properly being licensed as a dog fancier Ms. Bloor lost her privilege to

6. Petitioner's opposition to Defendants' motion for summary judgment, Docket Entry 14, attachment C.

function as a dog fancier... thereby reverting her status of operation to that of commercial kennel, as outlined in... Section 5-67(c) [of the Montgomery County Code.]

This case made its way through the Maryland Courts to this Court, No. 87-1239, **Bloor v. Montgomery County**, which denied certiorari on March 20, 1988.

4. Petitioner removes the fences, and applies for a dog fancier's license. Department of Animal Control denies the license. AMHB sustains the action of the Department of Animal Control, on the theory that the reason for the delicensing was irrelevant to the proceeding.

Thereafter, in October 1986, Petitioner removed the fencing in his back yard. He thereby also removed the reason why his wife's fancier license had been revoked. He then applied for a dog fancier license. By letter dated

November 7, 1986, Defendant Ferguson denied the fancier license on the grounds that the AMHB, which limited the number of permissible dogs to two, had implicitly found that Petitioner could not be granted a fancier's license. The copy of the letter in the record contains the following notation by "HAW," Harriet A. West, Manager of the Administrative Services Section of the Department of Animal Control and clerk of AMHB: "This letter was revised in my presence by [Assistant County Attorney] Wright before it was delivered to Mr. Friedman." [7]

Petitioner filed with AMHB an appeal of Defendant Ferguson's November 7 ruling. At hearing on June 24, 1987, [8] the panel consisted of laymen who, the record shows, are deferential to the

7. Petitioner's opposition to Defendants' motion for summary judgment, Docket Entry 14, attachment C.
8. **Ibid.**, attachment N.

County Attorney's office. Assistant County Attorney Frankel put into evidence various materials, including a copy of Defendant Ferguson's letter denying Petitioner his fancier license, TR. 6-10, but not a copy of Mr. Ferguson's August 1985 letter delicensing Petitioner's wife Bloor as a dog fancier because of the fences in Petitioner's back yard. When Petitioner attempted to introduce evidence about Bloor's having been delicensed, Mr. Frankel said that the reason for the delicensing was irrelevant to the proceeding. The position of Mr. Frankel immediately became the law of the case; without waiting for his colleagues to agree, Acting Chairman Cohen said that he would not accept evidence on the reason why Petitioner's wife had been delicensed. As an example of AMHB's deference to the

County Attorney's office, Mr. Cohen asked Mr. Frankel for legal advice. TR. 27, l. 13. Petitioner objected that Mr. Frankel was a litigant and not an advisor. Mr. Cohen responded that Mr. Frankel was a lawyer. When Petitioner attempted to adduce evidence showing the relationship between the delicensing of Bloor and the AMHB decision in the earlier nuisance action, Mr. Frankel objected, TR. 40, l.12. Mr. Cohen said that he would take administrative notice of "all the file of 35-85," i.e., the transcript and exhibits and AMHB's administrative file. TR. 40, l.7,18; TR. 44, l.9; TR. 54, l.20. When Petitioner attempted to introduce a memorandum, part of the public record and in the administrative file, from Assistant County Attorney Wright to Defendant Ferguson inconsistent with the

November 7, 1986 letter to Petitioner that Wright "revised and approved," Mr. Frankel objected to its introduction and Mr. Cohen initially agreed. TR. 41, 1.11; TR. 42, 1.5, 8. Mr. Cohen attempted to prevent Petitioner from making a closing argument based on Bloor's having been delicensed in August 1985.

By decision signed by acting Chairman Cohen on September 2, 1987, and served on Petitioner on October 19, AMHB sustained the decision of Defendant Ferguson. [9] AMHB's decision reads:

> [AMHB's] previous order limits the number of dogs... to a total of two.... [This decision] has been upheld... in the Montgomery County Circuit Court... and in the Maryland Court of Special Appeals.... [O]n November 7, 1987 [sic]... [Defendant] Ferguson denied [Petitioner's] application for a dog fancier license... because he did not meet the legal requirement for the minimum number of dogs owned by a dog

9. Petitioner's Brief on Appeal, Attachment 7.

fancier, which is three.... [Petitioner] failed to establish that the decision of [Defendant Ferguson] was arbitrary, illegal, or factually unwarranted.... [AMHB] hereby affirms the decision of [Defendant Ferguson] to deny [Petitioner's] application for a dog fancier's license.... Approved as to form and legality: Office of the County Attorney by A. Wright.

As noted, the members of the AMHB who decided the case are not lawyers, and the transcript of the hearing in this case indicates that Acting Chairman Cohen does not possess the ability to have drafted the decision of AMHB. Thus, it is certain that Mr. Wright supervised the drafting of the decision, and almost certain that he drafted it himself. It is also almost certain from the transcript that Mr. Cohen sought advice from Mr. Wright and highly likely that Mr. Wright obliged.

In addition, on June 4, 1986, the ubiquitous Mr. Wright also signed a memorandum to the AMHB as Mr. Frankel's

supervisor opposing a motion of Bloor and Petitioner in the closely related nuisance case. [10]

ARGUMENT

1. The Court of Appeals erred by affirming the dismissal of this suit on the grounds of preclusion while the variance case is pending in the state court system.

If the state court system finds that once the zoning code and the animal control ordinance are reconciled, Petitioner was entitled to a building permit for the fences, it would follow that the delicensing of his wife Bloor as a fancier, precisely because of the existence of the fences, was improper. Accordingly, the January 14, 1986 nuisance of AMHB which was predicated on

10. Petitioner´ opposition to Defendants´ motion for summary judgment, Attachment I.

the fact that Bloor had been delicensed as a dog fancier would not be entitled to preclusive effect. On the other hand, if the Maryland courts refuse to reconcile the two regulatory schemes, it would be an abuse of discretion for the Federal courts to refuse to reconcile them in this suit. The animal control ordinance has created a constitutionally protected property interest. **Board of Regents v. Roth**, 408 U.S. 564, 577 (1972. As the state court system has declined to provide a forum in which Petitioner can vindicate this right, the federal court should do so. **Deakins v. Monaghan**, ___ U.S. ___, 108 S.Ct. 523 (January 12, 1988).

2. The September 2, 1987 decision of AMHB is not entitled to preclusive effect because (a) it is predicated on the January 14, 1986 AMHB decision and (b) it

contains grave procedural defects in the hearing and the decisional process. Assistant County Attorney Wright advised both Defendant Ferguson and the administrative agency which approved Defendant Ferguson's conduct. Assistant County Attorney David Frankel attempted to prevent Petitioner from introducing evidence and argument in support of his position in circumstances where he knew that AMHB would defer to his position. This is a denial of a full and fair hearing.

3. There is an issue, namely the power of the AMHB, which Petitioner first raised to the United States District Court, but which under Maryland law can be raised at any time.

Article 25A, Section 5(J) of the Annotated Code of Maryland, entitled "health and nuisances," empowers home

rule counties to:

prevent, abate and remove nuisances; to prevent the introduction of contagious diseases into such county; to regulate the places of manufacturing soap and candles and fertilizers, slaughterhouses, packing houses, canneries, factories, workshops, mines, manufacturing plants and any and all places where offensive trades may be carried on, or which may involve or give rise to unsanitary conditions or conditions detrimental to health.

Article 5 of the Montgomery County Code, the Animal Control Ordinance, Section 5-25 thereof, states:

It shall be grounds for a... finding of **public** nuisance pursuant to Section 5-12 of this chapter for:... (c) Any animal or animals to cause unsanitary, dangerous or offensive conditions by virtue of the size or number of animals maintained at a single location or due to the inadequacy of the facilities. (d) Any animal to make or cause noises audible within a building on adjacent property and of sufficient volume so as to disturb the quiet enjoyment of the occupants thereof." (emphasis supplied)

Section 12, entitled "authority to abate **public** nuisances," states that Animal Matters Hearing Board enjoys the authority to declare, after written

complaint and hearing, that an animal or a facility is a **public** nuisance and to "issue cease and desist, impoundment, payment of damages, destruction, or other orders to abate a public nuisance," and to require the animal owner to "comply with an impoundment order by delivering the animal to the animal control officer."

AMHB's January 14, 1986, decision found that Bloor's dogs were "public" nuisances based, inter alia, on the barking and odors of the dogs. However, these occurrences are private, rather than public nuisances. Thus, nuisances are either public, i.e., an unreasonable interference with a right common to the general public, or private, a nontrespassory invasion of of another's interest in the private use and enjoyment of land. **Restatement,2d of Torts**, Vol.

4, Sec. 821A, 821D (1979). Accord: **Tull v. U.S.**, ___ U.S. ___, 107 S. Ct. 2378, 2386 (April 28, 1987), citing **Prosser, Handbook of the Law of Torts,** 4th Edition (1971), at p. 583: A public nuisance is an act or omission which "obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects." Prosser, describes the separate evolution of public and private nuisances, pp. 571-573, and notes at p. 573 that "the two have almost nothing in common." Prosser, continues: [p.585] To be considered public, the nuisance must affect an interest common to the general public, rather than peculiar to one individual, or several. [p.591] The essence of a private nuisance is an interference with the use and enjoyment of land. [Private nuisances include]

"the dog next door which makes night hideous with his howls"; [p.592] [A private nuisance] may consist of a disturbance of the comfort or convenience of the occupant, as by unpleasant odors... [or] loud noises.

Petitioner submits that under state law, the State of Maryland has not granted Montgomery County the power to abate private nuisances. And in Maryland, one can always attack the power of a court. **Van Wagenberg v. Van Wagenberg**, 241 Md. 154, 215 A.2d 812 (1966), cert. den. 385 U.S. 833. And it follows that one can also always attack the power of the agency. **Karabetis v. City of Baltimore**, 72 Md. App. 407, 530 A.2d 293, 298-299 (1987). If questions of the power of AMHB are not entitled to preclusive effect in other fora, there is no reason to give them

preclusive effect in related litigation in federal court under 42 U.S.C. Sec. 1983. **Kremer v. Chemical Construction Corp.**, 456 U.S. 461, 482 (1982).

4. Finally, the conduct of Assistant County Attorneys Wright and Frankel in the conduct of the proceedings before AMHB, and the conduct of AMHB, constituted independent constitutional torts, namely denial of meaningful access to the administrative agency. The mere fact that the constitutional torts occurred at a hearing is no grounds to dispose of them on the grounds of preclusion.

CONCLUSION

This Court should remand to the Court of Appeals, with directions to remand this case to the District Court and to retain it until the related zoning case has been concluded, and to certify to

Maryland's Court of Appeals the issue of the power of AMHB to regulate private nuisances. Alternatively, the Court should make such other disposition as is just and proper.

Respectfully submitted,

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UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILBUR H. FRIEDMAN

Plaintiff-Appellant

v. No. 87-3758

THOMAS B. FERGUSON, et al.

Defendants-Appellees

On Petition for Rehearing

Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing be denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Widener and Judge Phillips.

Filed July 21, 1988

UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILBUR H. FRIEDMAN

Plaintiff-Appellant

v. No. 87-3758

THOMAS B. FERGUSON, et al.

Defendants-Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore, Joseph C. Howard United States District Judge (C/A No. 86-3640)

Before Widener, Phillips and Murnaghan, Circuit Judges

Per curiam:

Wilbur H. Friedman appeals from the district court's order denying relief under 42 U.S.C. Sec. 1983. Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm based upon the district court's conclusion that Friedman's claims were barred by **res judicata** and collateral

estoppel. **Friedman v. Ferguson**, C/A No. 86-3640 (D. Md. Sept. 28, 1987). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid in the decisional process. Appellant's motions to file a reply brief and for the Court to take judicial notice of three documents (an order of the Circuit Court for Montgomery County filed July 29, 1987, a letter dated May 14, 1986, and an application for a dog fancier's license) are granted.

AFFIRMED

Decided June 29, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILBUR H. FRIEDMAN

Plaintiff

v. Civil No.
JH-86-3640

THOMAS B. FERGUSON, et al.

Defendants

MEMORANDUM

Pending before the Court is plaintiff's complaint filed pursuant to 42 U.S.C. Sec. 1983 and alleging that he was denied a "dog fancier's license" in violation of his constitutional rights. Named as defendants are the Director of the Montgomery County Department of Animal Control, his advisors, and the Chairman and other members of the Animal Matters Hearing Board ("Board").

The immediate matter under consideration herein is defendants' motion for summary judgment. In their

motion defendants contend that, under the facts of this case, summary judgment must be granted because litigation of this matter is precluded by the doctrine of collateral estoppel; this Court should abstain in accordance with **Younger v. Harris**, 401 U.S. 37 (1971); and that the defendants are entitled to qualified immunity. Upon review of the pleadings, the Court finds that no hearing is necessary. Local Rule 6(G).

The doctrine of **Younger v. Harris**, supra, or "abstention" arises not from "lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced." **Ohio Civil Rights Commission v. Dayton Christian Schools**, ___ U.S. ___, 106 S.Ct. 2718, 2733 (1986). The

Younger principle, first applied to state criminal proceedings, has since been held applicable to state administrative proceedings where important state interests are involved and the plaintiff would have a full and fair opportunity to litigate his Constitutional claim. **Gibson v. Berryhill,,** 411 U.S. 564 (1973) (a state administrative proceeding addressing the revocation of a license to practice medicine required abstention); **Middlesex County Ethics Committee v. Garden State Bar Assn.**, 457 U.S. 423 (1982). (federal courts should abstain from enjoining lawyer disciplinary proceedings initiated by the state ethics committee.)

In the present case, plaintiff has challenged the denial of his request for a dog fancier's license and that matter is currently pending an appealable

administrative proceeding. Such matters of public health and safety are inherently within the province of state and local government.

In his memorandum responding to defendants' motion for summary judgment, plaintiff alleges, in a conclusory manner, that he is being subjected to harassment by the County Attorney's offices. This statement, and all others, are seemingly incorporated in Plaintiff's brief affidavit. The Court has reviewed plaintiff's memorandum and finds insufficient facts to support this charge. Indeed, it is plaintiff who has persisted in the prosecution of this matter. Furthermore, the transcripts of various proceedings before the board and the state court opinions submitted in support of plaintiff's motions show that plaintiff has not been unable to obtain a

full and fair hearing of his constitutional claims before the state tribunals. Accordingly, this court will abstain from deciding this matter.

In addition, the Court notes that the matters alleged in plaintiff's complaint have previously been alleged and decided by in the state courts. "**Allen [v. McCurry**, 449 U.S. 90 (1980)]... made clear issues actually litigated in a state court proceeding are entitled to the same preclusive effect in a subsequent federal Sec. 1983 action as they enjoy in the court of the state where the judgment was rendered." **Migra v. Warren District School Board of Education, et al.**, 465 U.S. 75 (1984).

Accordingly, summary judgment in favor of the defendants will be granted by separate order.

/s/ Joseph C. Howard, United States District Judge. Dated: 8/27/87

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

NO. 1414

September Term, 1987

WILBUR H. FRIEDMAN

v.

MONTGOMERY COUNTY, MARYLAND

Garrity
Bell, Robert M.
Getty, James S. (Retired, specially assigned)

PER CURIAM

Filed May 18, 1988

This is an appeal by Wilbur H. Friedman, appellant, from the judgment of the Circuit Court for Montgomery County affirming the County Board of Appeals' dismissal of appellant's petition for variance. It presents but one question:

Whether the Board of Appeals for Montgomery County and the Circuit Court for Montgomery County are required to look outside the zoning code to determine

whether a "use" said to be barred by the Zoning Code is required or permitted by another regulatory scheme, and whether the Board and the Circuit Court are required to harmonize the two regulatory schemes. [1]

We will affirm.

Appellant's residence is located in the R-60 zone in Montgomery County. A permitted use in that zone is a "kennel, non-commercial", [2] "[p]rovided that no

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1. Appellant purports to reserve for the federal courts an additional question: "Whether, by its failure to consider the other regulatory scheme, the Circuit Court has committed a constitutional tort by denying Land owner a forum in which to assert rights arising from that second regulatory scheme." He makes no argument on that issue and, thus, we will also refrain from doing so.

2. Sec. 59-A-2.1 of the Montgomery County Code defines "kennel, non-commercial", as [a]ny building or buildings and land use, designed or arranged for the boarding, breeding or care of dogs, cats, pets, fowl or other domestic animals belonging to the owner thereof, kept for purposes of show, hunting, or as pets, not including riding stables."

accessory buildings, enclosures or runs may be constructed or used for these dogs." Sec. 59-C-1.31, Montgomery County Code. The County Board of Appeals is authorized by Sec. 59-A-4.11(b) to hear and decide "[p]etitions for variances from the strict application of [the Zoning Ordinance], as provided in Article G-3"; however, the Board may not, "under the guise of a variance,... authorize a use of land not otherwise permitted," Sec. 59-G-3.1.(d), or "validate, ratify or legalize any violation of law or any of the regulations of [the zoning ordinance.] Sec. 59-A-4.126.

On August 6, 1985, appellant filed an application with the Montgomery County Department of Environmental Protection for a permit to erect a series of fences on his property. The purpose of the fences was "to pen puppies for owner´s

kennel, non-commercial." That application was denied on the basis of the prohibition contained in Sec. 59-C-1.31. Appellant did not appeal the denial; rather he submitted an application to the County Board of Appeals for a variance from the application of Sec. 59-C-1.31.

Appellant's application for variance was referred to a hearing examiner. The hearing examiner, after conducting a public hearing, filed his report and recommendation, in which he concluded that the Board did not have authority to grant a use variance for an accessory use. He thus recommended that the appellant's application be dismissed for lack of jurisdiction. The Board adopted the hearing officer's report and recommendation as its opinion and appellant appealed to the Circuit Court. Neither of these decisions specifically

considered or attempted to harmonize the Zoning Ordinance and the Animal Control Ordinance, Chapter 5 of the Montgomery County Code, although appellant contends that he requested that they do so.

Appellant wisely does not make any contention that the Board's decision on the merits of his variance application is incorrect. The entire thrust of appellant's argument on appeal is that the Board should have considered provisions of Chapter 5 of the Montgomery County Code (Animal Control), specifically Sec. 5-1, 5-30, 5-31, 5-32, and 5-67(c) and (f), in deciding his application. He asserts that these provisions should have been "harmonized" with the applicable provisions of Chapter 59.

Aside from the fact that, with the

exception of Sec. 5-30, the sections cited by appellant do not apply to appellant's situation, the short answer to appellant's argument is that none of those sections is relevant to a decision to grant or deny a use variance. [3] Sec.

3. Sec. 5-1 defines a "dog fancier" (one who owns or keeps three or more dogs within or adjoining a private residence, three or more dogs for non-commercial purposes) and "dog fancier's kennel" (private kennel maintained by a dog fancier within or adjoining a private residence for the maintenance or training of dogs owned or kept by the fancier). Sec. 5-67(c) and (f) relate to the requirement that a dog fancier's kennel be licensed and the prohibition against issuing a license for a location which is in violation of the Zoning Code. Appellant does not contend that he is a dog fancier, owns a dog fancier's kennel, is licensed to operate a dog fancier's kennel or has applied for a license to operate a dog fancier's kennel, which was refused. At best, he is contending that his wife is a dog fancier. Even at that, however, he implicitly acknowledges that the purpose for seeking a variance as to enable his wife to run a kennel, non-commercial on the property. Accordingly, appellant does not have standing to make an argument premised on these sections. Appellant conceded at oral argument that he does not have vicious or dangerous animals, Sec. 5-31, or attack dogs, Sec.

5-30, the only section that arguably applies to appellant's situation, relates to the confinement of female dogs in heat. It provides:

> Every owner of a female dog shall, whenever the dog is in heat, keep it confined in a building, compartment or other secure enclosure, in such manner as to prevent the attraction of other animals.

It is apparent that this section in no way conflicts with Sec. 59-C-1.31. Sec. 5-30 does not require that female dogs in heat be confined out of doors; it requires only that they be confined in a building, compartment or other secure enclosure, in such manner as to prevent the attraction of other dogs. Since such confinement could be indoors, it is patent that compliance with its mandate may readily be had without the need for a variance. Therefore, this provision does

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5-32. Consequently, he does not have standing pursuant to these sections either.

not conflict with the Zoning Ordinance.

Since the provisions in Chapter 5 relied on by appellant either are inapplicable to appellant's situation or do not conflict with the Zoning Ordinance, the Board had no occasion to "harmonize" them with the Zoning Ordinance. It follows that the court did not err in affirming its decision. JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

IN THE COURT OF APPEALS OF MARYLAND

WILBUR H. FRIEDMAN

v. Petition Docket No. 189

MONTGOMERY COUNTY, MARYLAND

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above-entitled case, it is ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable or in the public interest.

/s/ Robert C. Murphy, Chief Judge

Dated: August 29, 1988